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SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 910

HENRY R. DRENT, et al.,

Petitioners,

-against-

COLONEL WILLIAM A. McKEAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I N D E X

Page

Opinion Below 2

Jurisdiction. 2

Questions Presented 2

Statutory Provision Involved. 3

Statement of the Case 5

Facts 5

Proceedings 6

THE QUESTIONS ARE SUBSTANTIAL

I. THE QUESTION OF WHETHER AN APPLICATION FOR ORDER TO SHOW CAUSE SHOULD BE SUMMARILY DISMISSED UNDER ANY CIRCUMSTANCES OTHER THAN THAT ON ITS FACE THE CLAIMS ARE PATENTLY FRIVOLOUS 8

II. THE QUESTION OF WHETHER OR NOT THE ISSUES RAISED BY THE APPLICATION IN THE DISTRICT COURT FOR ORDER TO SHOW CAUSE WHY HABEAS CORPUS SHOULD NOT ISSUE WERE SO PATENTLY FRIVOLOUS AS TO JUSTIFY SUMMARY DISMISSAL. 11

1. The instant action is different from previous cases drawing in question the applicability of P.L.

89-687 to pre-existing enlistment contracts 11

2. This Court has indicated that contracts with the government are as binding as contracts between individuals and the terms thereof cannot be abrogated by subsequent legislation 15

3. The breakup of petitioners' unit and the assignment of petitioners individually denied them due process of law by denying them credit for prior active duty which they would have received had they been called as individuals. 22

CONCLUSION 26

Appendix A-1

Page

TABLE OF CASES

Bell v. United States, 366 U.S. 393 (1961) 19

Bolling v. Sharpe, 347 U.S. 497, 499 (1954) 23

Even v. Clifford, 287 F.Supp. 400 (S.D. Calif. 1968) 13

Ex parte Watkins, 3 Pet. 193, 203 (1830) 9, 10

Fay v. Noia, 372 U.S. 391 (1963) . . 9

Fox v. Brown, 286 F.Supp. 855, 858 (S.D.N.Y. 1968), aff'd - F.2d - (2nd Cir. Oct. 21, 1968) (N.Y. L.J., Dec. 10, 1968, p.1). 14

Gion v. McNamara (No. 67-1563 - EC, C.D.Calif. Jan. 9, 1968) . 12, 17, 18, 20, 21

Goldstein v. Clifford, 290 F.Supp. 275 (D.N.J. 1968). 14

Hiatt v. Brown, 339 U.S. 103 (1950) 2

Levy v. Louisiana, 20 L. ed.2d 436 (1968) 25

Linsalata v. Clifford, 290 F.Supp. 338 (S.D.N.Y. 1968). 13

Page

Lynch v. United States, 292 U.S. 571, 579, 580 (1934) . . . 20, 21

Morse v. Boswell, 239 F.Supp. 812, 818 (D.Md. 1968), aff'd 401 F.2d 544 (4th Cir. 1968). . 14, 23

Pennsylvania v. Claudy, 350 U.S. 117, 119 (1956). 10

Perry v. United States, 294 U.S. 330 (1935) 21

Pfile v. Corcoran, 287 F.Supp. 554 (D.Colo. 1968). 13, 14

Quong Wing v. Kirkenda'l, 223 U.S. 59, 62 (1912). 24

Radio Position Finding Corp. v. Bendix Corp., 205 F.Supp. 850, 856, 857 (D.Md. 1962), aff'd 371 U.S. 577 (1963) 23

Radovich v. National Football League, 352 U.S. 445, 448 (1957). 12

Re Boardman, 169 U.S. 39, 43 (1898). 9

Sullivan v. Cushman, 290 F.Supp. 659, 661 (D.Mass. 1968) 10, 14

Union Pac. R. Co. v. United States, 99 U.S. 700, 719 (1879). 20

Page

United States v. Grimley, 137 U.S. 147 (1890) 18, 19

Winters v. United States, 281 F.Supp. 289 (E.D.N.Y. 1968), aff'd 390 F.2d 879 (2nd Cir. 1968), cert.den. 37 U.S.L.W.. . . 13

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND REGULATIONS INVOLVED

U. S. Const., Art. I, Section 9 . . 8

U. S. Const., Art. I, Section 9, Clause 15 16

U. S. Const., Amend. V. 7, 23

U. S. Const., Amend. XIII 7

U. S. Const., Amend. XIV. 23

10 U.S.C. § 311 16

10 U.S.C. § 3498. 24

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 2241 et seq. 7

28 U.S.C. § 2243. 9

P.L. 89-687, Title I, § 101, Oct. 15, 1966, 80 Stat. 981, 10 U.S.C.A. § 263 note (1967 Cum. Supp.). 3, 11, 12, 17, 18, 22, 24

Page

General Order 78, April 19, 1968 issued pursuant to E.O. 11406, April 13, 1968, 33 F.R. 5735, under authority of Title I,(e) of P.L. 89-687, 80 Stat. 981, effective Oct. 15, 1966 . . . . .6, 12

Rule 20(a), Federal Rules of Civil Procedure 7

OTHER AUTHORITIES

Wiener: The Militia Clause of the Constitution, 54 Harv.L. Rev. 181 (1940) 16

SUPREME COURT OF THE UNITED STATES

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No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari to the United States Court of Appeals for the Fifth Circuit issue to review the order of that Court (A-1*) filed October 7, 1968 denying petitioners' motion to reinstate and grant their petition for order to show cause why a writ of habeas corpus should not issue which was dismissed by the United States District Court for the

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* "A" references are to pages in the appendix hereto.

Northern District of Alabama by its order of October 4, 1968 (A-2).

Opinion Below

The District Court, Chief Judge Lynne, dismissed the application for order to show cause by order (without a separate opinion) cast in language denoting the exercise by the Court of its judicial discretion, and gave no reasons for the dismissal (A-3). The Court of Appeals denied without opinion petitioners' motion to reinstate and grant the order to show cause and to make the same returnable to the District Court (A-1). None of the orders below have been published or otherwise reported.

Jurisdiction

The order of the District Court was made and entered October 4, 1968 and the order of the Court of Appeals was made and filed October 7, 1968. No orders respecting a rehearing or granting an extension of time within which to petition for certiorari have been issued or requested. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Hiatt v. Brown, 339 U.S. 103 (1950), sustains this jurisdiction.

Questions Presented

1. Where National Guardsmen had enlisted under contracts containing no pro-

visions for their call to active duty except upon unsatisfactory performance, and the Guardsmen had performed satisfactorily but were activated as a unit nevertheless under the provions of a Congressional enactment which became effective after their enlistment, is an application for an order to show cause why habeas corpus should not issue to discharge petitioners from such active duty so patently frivolous as to justify its summary dismissal?

2. Where National Guardsmen had been activated as a unit and thus each was not entitled to credit for prior active duty time served, which he would be entitled to had he been called individually, and after activation the unit is broken up and its members assigned elsewhere, is an application for order to show cause why habeas corpus should not issue, based upon denial of equal protection, so patently frivolous as to justify its summary dismissal?

Statutory Provision Involved

P.L. 89-687, Title 1, § 101, Oct. 15, 1966, 80 Stat. 981, 10 U.S.C.A. § 263 note (1967 Cum.Supp.):

> "(a) Notwithstanding any other provision of law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> "(1) is not assigned to, or par-

ticipating satisfactorily in, a unit in the Selected Reserve, and

"(2) has not fulfilled his statutory reserve obligation, and

"(3) has not served on active duty or active duty for training for a total of twenty-four months.

"(b) Notwithstanding the provisions of any other law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who had become a member of a reserve component prior to July 1, 1966; and who

"(1) has not served on active duty or active duty for training for a period of one hundred and twenty days or more, and

"(2) has not fulfilled his statutory reserve military obligation.

"(c) A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals twenty-four months. If the enlistment or period of military service of a member of the Ready Reserve ordered to active duty under subsections (a) or (b) of this section would expire before he has served the required period of active duty prescribed herein, his enlistment or period of military service may be extended until that service on active duty has been

completed.

"(d) In order to achieve fair treatment as between members in the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

"(1) family responsibilities; and

"(2) employment necessary to maintain the national health, safety, or interest.

"(e) Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months."

Statement of the Case

Facts

Petitioners are 77 members of the Army National Guard of New Jersey and 56 wives. These guardsmen all enlisted in the National Guard under the terms of enlistment contacts which made no provision for their "call-up" to active duty, except for failure to perform duties required under the terms of the contract. None of these petitioners-guardsmen has failed to perform any duties so required of him.

Notwithstanding the provisions of their enlistment contracts, petitioners were called to active duty by virtue of orders from United States First Army Headquarters issued pursuant to authority granted by Executive Order,* and are all now stationed at Fort McClellan, Alabama, with the exception of certain of the petitioners who have already been shipped to Viet Nam. Others of these petitioners are currently under military orders to be shipped to duty posts there also.

Proceedings

An order to show cause why one or more writs of habeas corpus should not issue directing respondents to discharge these guardsmen from custody was sought on application therefor to the United States District Court for the Northern District of Alabama, Hon. Seybourn H. Lynne, Chief Judge, on October 4, 1968, and dismissed that same date. As part of the proposed order there it was sought to have respondents hold these guardsmen within the Northern District of Alabama pending determination of the case on its merits. Jurisdiction of that Court to entertain the application was grounded upon the

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* General Order 78, April 19, 1968 issued pursuant to E.O. 11406, April 13, 1968, 33 F.R. 5735, under authority of Title I,(e) of P.L. 89-687, 80 Stat. 981, effective October 15, 1966.

Fifth and Thirteenth Amendments to the United States Constitution, Title 28, United States Code, §§ 2241, et seq. and Rule 20(a), Federal Rules of Civil Procedure.

On October 7, 1968 a motion was made to a panel of the United States Court of Appeals for the Fifth Circuit sitting in Atlanta, Georgia, to reinstate and grant petitioners' application and make the same returnable to the District Court for the Northern District of Alabama. This was denied the same day.

Thereafter this petition for certiorari to the United States Court of Appeals for the Fifth Circuit was filed to bring before this Court review of the determination of the Court of Appeals below.*

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* In addition, on October 11, 1968, a request for the stay of execution of military orders to halt shipment of some guardsmen to Viet Nam was directed to the Hon. Hugo Black, Circuit Justice for the Fifth Circuit, and by him denied on October 12, 1968. That application was renewed before the Hon. William O. Douglas on or about November 7, 1968 and by him denied on November 18, 1968.

THE QUESTIONS ARE SUBSTANTIAL.

I.

THE QUESTION OF WHETHER AN APPLICATION FOR ORDER TO SHOW CAUSE SHOULD BE SUMMARILY DISMISSED UNDER ANY CIRCUMSTANCES OTHER THAN THAT ON ITS FACE THE CLAIMS ARE PATENTLY FRIVOLOUS.

The Great Writ is mentioned only once in the United States Constitution, in Article I, Section 9, where it is declared:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

This Court, speaking through Chief Justice Marshall, early noted the extreme importance of the Great Writ in our legal framework:

> "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. English judges, being originally under the influence of the crown, neglected to issue this writ where the government enter-

> tained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial." Ex parte Watkins, 3 Pet. 193 (1830)

And its importance has been frequently commented on by this Court since then. See Fay v. Noia, 372 U.S. 391 (1963).

In conformity with the traditional view taken of the Great Writ, the Judicial Code clearly states (28 U.S.C. § 2243):

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

The command of this section is quite unequivocal, but also indicates that the applicant's papers must have no doubt that he is entitled to the Writ. In Re Boardman, 169 U.S. 39, 43 (1898), this Court declared that where it is apparent that the only result in granting the Writ would be to remand the applicant to custody, the Writ need not be issued. This seems also to have been the view of Chief Justice Marshall in Ex parte Watkins,

supra, at 203. In Pennsylvania v. Claudy, 350 U.S. 117, 119 (1956), Mr. Justice Black speaking for this Court restated the rule found in earlier cases by indicating that the Writ or order to show cause should be granted where the claims are not "patently frivolous or fake." (See also cases cited n. 4, at 119.) Indeed, Justice Black noted further that "the proceeding should not be summarily dismissed merely because" allegations of the petitioner are denied by the respondent.

The allegations in the application herein were manifestly not patently frivolous, as discussion hereinafter shows. Moreover, it must be noted that originally the application for order to show cause was summarily dismissed and not denied, and whether it was dismissed based upon the District Court's opinion that the law did not support petitioners under any circumstances or that the allegations were otherwise "patently frivolous" cannot be ascertained from this record. In any event, it is respectfully submitted that in view of the critical importance and high role given to the Great Writ, nothing short of patent frivolity should justify such summary treatment of the application herein.*

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* Cf. Sullivan v. Cushman, 290 F.Supp. 659, 661 (D.Mass. 1968), where a three judge court considered claims similar to those made herein:

II.

THE QUESTION OF WHETHER OR NOT THE ISSUES RAISED BY THE APPLICATION IN THE DISTRICT COURT FOR ORDER TO SHOW CAUSE WHY HABEAS CORPUS SHOULD NOT ISSUE WERE SO PATENTLY FRIVOLOUS AS TO JUSTIFY SUMMARY DISMISSAL.

1. The instant action is different from previous cases drawing in question the applicability of P.L. 89-687 to pre-existing enlistment contracts.

The application to the District Court contained ten separate claims, the first three and the sixth of which went directly to the question of the relationship between the enlistment contracts of these guardsmen and P.L. 89-687, Title I, § 101(e), 80 Stat. 981 (Oct. 15, 1960), 10 U.S.C.A. § 263 note (1967 Cum.Supp.) whereby the President was given authority to call into active duty, for up to 24

> "We will not dismiss the complaint [for injunctive relief] at this time, however, because we need not, and do not, presently reach the question whether the proposed activation of petitioners for as long as 24 months may be a violation of their rights."

months, units of the Ready Reserve. The facts alleged in the application to the District Court must be taken as true herein, Radovich v. National Football League, 352 U.S. 445, 448 (1957), and there it was asserted that all petitioners* belonged to the Army National Guard of New Jersey; that all of them signed various contracts, appended to the application as Exhibits A through D; and that none of these National Guard contracts made any provision for activation of the guardsmen under any circumstances other than failure to satisfactorily perform duties thereunder. Notwithstanding the provisions of these contracts, petitioners were called into active duty, as a unit, under orders issued pursuant to Executive Order 11406, April 13, 1968, 33 F.R. 5735, promulgated under § 101(e).

Yet the fact that these National Guard contracts make no provision for activation, clearly distinguishes this case from the cases which have been previously where P.L. 89-687 was drawn in question as not being applicable to a petitioner who had enlisted prior to its effective date, which is the case with these petitioners. The first, unreported, is Gion v. McNamara (No. 67-1563-EC, C.D. Calif., Jan. 9, 1968), involving a Marine Corps Reservist, who enlisted under a

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* While some of the guardsmen's wives are petitioners herein, "petitioners" hereinafter refers solely to the guardsmen themselves.

contract providing for activation under certain circumstances "or when otherwise prescribed by law." Even there, the Court held that the petitioner could not be called to more than 45 days of active duty for unsatisfactory performance, because this was the period prescribed in his contract and subsequent legislation could not change that contract. Even v. Clifford, 287 F.Supp. 400 (S.D. Calif. 1968), and Winters v. United States, 281 F.Supp. 289 (E.D.N.Y. 1968), aff'd 390 F.2d 879 (2nd Cir. 1968), cert.den. 37 U.S.L.W., also involved Marine Reservists, under the same kind of contract involving a 45 day activation period. The court in Even held that the petitioner was not injured by the operation of the Act and the District Court in Winters directly relied on the general language of the contract which it held included future changes in the law, though that opinion includes considerable discussion of other matters. These cases all involved Marine Reservists activated because of unsatisfactory reserve participation, which is not the case with the instant petitioners, who are National Guardsmen activated with a unit, with no charge of unsatisfactory participation.

In Pfile v. Corcoran, 287 F.Supp. 554 (D.Colo. 1968), an Army Reservist was activated for unsatisfactory performance, the court there noting that "the contingency of a declaration of war or national emergency is specifically provided for in the enlistment contract." In Linsalata v. Clifford, 290 F.Supp. 338 (SDNY 1968), the

court relied on a contract clause providing for activation under certain circumstances "or when otherwise authorized" in order to find that petitioner, an Air Force Reservist, was lawfully activated under the new law. In Sullivan v. Cushman, 290 F.Supp. 659 (D.Mass. 1968), the Army Reservists' contracts provided for "active duty ... in time of war or national emergency and at such other times as the national security requires...." In Morse v. Boswell, 289 F.Supp. 812 (D.Md. 1968), aff'd 401 F.2d 544 (4th Cir. 1968), also involving Army Reservists, the District Court noted (footnote 6, at 818) that the contracts were similar to those in Pfile, supra. Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968), involved Air Force National Guardsmen whose contract indicated that they could be activated "in time of national emergency declared by the President ... or when otherwise authorized by law...." And in the most recent case involving P.L. 89-687, Fox v. Brown, 286 F.Supp. 855 (S.D.N.Y. 1968), aff'd - F.2d - (2nd Cir. Oct 21, 1968) (N.Y.L.J., Dec. 10, 1968, p.1), also involving an Air Force National Guardsman, the contract provided that upon unsatisfactory performance

> "... my name will be sent through channels to the appropriate agencies for their action in determining how much service I will be required to perform by recall to active duty." (286 F.Supp. at 858)

These cases demonstrate that a compelling distinction between the situation

of these petitioners and that of reservists and guardsmen in prior cases existed on the very face of the application for order to show cause. It is respectfully submitted that this fact alone points up the error below in the summary dismissal by the District Court as well as the summary denial of petitioners' motion to reinstate made in the Court of Appeals. Petitioners certainly were entitled to their day in court, particularly where their application for order to show cause why habeas corpus should not issue raised questions involving contracts different from those in prior cases. In the face of this fact it cannot be said that petitioners' claims were so patently frivolous to justify such summary treatment.

2. This Court has indicated that contracts with the government are as binding as contracts between individuals and the terms thereof cannot be abrogated by subsequent legislation.

The critical question sought to have reviewed by this Court is whether or not the claim that a later enactment by Congress can have the effect of changing substantially the rights of State National Guardsmen under enlistment contracts entered into prior thereto is so patently frivolous as to justify summary refusal to even allow the order to show cause requested herein. As noted above the contracts did not provide for any activation of these petitioners, notwithstanding

that in each case the contract did provide that

> "In the event of war or national emergency declared by Congress my enlistment, which would otherwise expire, will be continued in effect until 6 months after the end of such war or emergency, unless sooner terminated."
> (See Ex. A to application herein)

This extension of service in time of "war or national emergency declared by Congress" is fully consonent with the traditional view of the militia, of which the National Guard is an organized part. 10 U.S.C. § 311. Clause 15 of Sec. 8, Art. I of the United States Constitution provides that "Congress shall have Power ... To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." And historically the militia has been preserved for the purpose of assuring law and order within the confines of the nation. See generally Wiener: The Militia Clause of the Constitution, 54 Harv.L.Rev. 181 (1940). The fact is that the contracts of these petitioners, on this record, are different from the contracts in cases arising heretofore so that under classic rules of interpretation, some different effect or result must have been intended. Congress paid for the organizing, equipping and training of these petitioners and at the same time made no provision in their contracts for activation in case of war or national emergency. Congress' intent thereby is

clear that this unit, at least, was to be part of an organized militia force of the State of New Jersey which would be available to the State for its use, in time of domestic emergency. "In time of war or national emergency declared by Congress" the enlistments "which would otherwise expire" were to be "continued in effect until 6 months" thereafter for the same purpose, i.e., to have available trained military personnel for the purpose of "home line" defense. This rationale points out the purpose of the difference between the instant contracts and those in prior cases.

The critical question nevertheless is whether or not P.L. 89-687 affected the contractual obligations of these petitioners. In the Gion case, supra, the court held unequivocally:

> "1. Petitioner's status as Ready Reservist is based upon contract. In accordance with said contract Petitioner may not be ordered without his consent to perform more than forty-five (45) days of additional duty for training for unsatisfactory participation in the Ready Reserve.
>
> "2. The ordering of Petitioner to involuntary active duty for more than forty-five (45) days because of unsatisfactory participation in the Ready Reserve, pursuant to authority derived from Public Law 89-687, 80 Stat. 981 (Note to 10 U.S.C.A. Section 273, 1966, Cumulative Pocket Part), constituted a violation of

> Petitioner's enlistment contract, and application of said Public Law as to Petitioner constituted violation of the due process clause of the Fifth Amendment to the Constitution of the United States." (p. 5, mimeo opin.)

There the reservist was sought to be activated for 16 months pursuant to authority in § 101(a) of the Law notwithstanding the 45 day activation provision and notwithstanding the claim by the respondents there that a provision in the enlistment contract provided for activation "when otherwise prescribed by law" and that Congress had otherwise "prescribed" in P.L. 89-687. Even this kind of general language, however, was held insufficient to carry into the agreement any legislation becoming effective subsequent to the date of the enlistment contract.

The case herein is easier than Gion because no such general language exists, which might justifiably be construed to carry future legislation into the agreements as part of their terms. Indeed, as pointed out above, there are no provisions herein for any activation whatsoever, except for unsatisfactory performance.

This Court has previously had occasion to note that enlistment in the military service is a voluntary act which establishes a contractual relationship and is governed by rules of contract law, United States v. Grimley, 137 U.S. 147 (1890), and that that contract changes the status of the individual from that of

citizen to solder, Bell v. United States, 366 U.S. 393 (1961), United States v. Grimley, supra, or, in this case, to organized militiamen.

> "Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. * * *
>
> "By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status." United States v. Grimley, supra, at 151. 152.

By the same token, of course, where the "State" has represented that the militiaman would not be called to active federal service during the period of his enlistment, it should not now be allowed to profit from its own superior position by

exercising a power, under any guise, of being able to substantially alter the existing contract. Cf. Gion v. McNamara, supra.

In Lynch v. United States, 292 U.S. 571 (1934), Mr. Justice Brandeis, speaking for this Court, noted:

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central P.R. Co. 118 U.S. 235, 238, 30 L.ed. 173, 174, 6 S. Ct. 1038; United States v. Northern P.R. Co. 256 U.S. 51, 64, 67, 65 L. ed 825, 828, 830, 41 S. Ct. 439. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (At 579)

and cited the following from Union Pac. R. Co. v. United States, ("Sinking Fund Cases") 99 U.S. 700, 719 (1879):

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the

> grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." (See also 292 U.S. at 580)

See also Perry v. United States, 294 U.S. 330 (1935).

These cases clearly demonstrate that the claim of these petitioners made to the courts below was not frivolous and was based upon their status as National Guardsmen resulting from a binding contract with the federal government. Not only do prior cases of this Court support petitioners' contentions herein that these contracts cannot be abrogated by subsequent Congressional action, but no prior case in lower federal courts have involved contracts like those contained in the record herein. Moreover, one of these prior cases, the Gion case, directly supports petitioners' contentions and unless the conclusion there can be considered patently frivolous, the order to show cause herein should not have been dismissed. The question of the effect on these petitioners of legislation substantially affecting their rights under existing enlistment contracts is a critical one, affecting a great many National Guardsmen. Resolution of the question is ripe in light of the large volume of litigation similar to that herein; this case is appropriate for it because of the seeming lack of ambiguity in the instant contracts.

3. The breakup of petitioners' unit and the assignment of petitioners individually denied them due process of law by denying them credit for prior active duty which they would have received had they been called as individuals.

The seventh and eighth claims made in the original application were that the orders calling petitioners to active duty failed to provide for credit for prior active duty time actually served. Section 101(c) of the P.L. 89-687 provides:

> "A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals twenty-four months. If the enlistment or period of military service of a member of the Ready Reserve ordered to active duty under subsections (a) or (b) of this section would expire before he has served the required period of active duty prescribed herein, his enlistment or period of military service may be extended until that service on active duty has been completed."

On its face it appears that any reservist called to duty under § 101 is entitled to be given credit for prior active duty time toward the total 24 months required to be served under the section.

Petitioners respectfully submit that any other reading of this statute deprives them of due process guaranteed by the Fifth Amendment, by making an invidious discrimination between reservists called individually and those called as part of an entire unit which has been activated, and applying to the latter no credit for previous active duty time. This claim was rejected in Morse v. Boswell, supra, on the grounds that "rational differences in treatment of units and individuals are clearly not violations" of the concepts of equal protection.

In the past this Court has made it clear that "discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). In addition the three-judge District Court in Radio Position Finding Corp. v. Bendix Corp., 205 F.Supp. 850, 856, 857 (D.Md. 1962), aff'd 371 U.S. 577 (1963), stated clearly:

> "Unlike the Fourteenth Amendment which is applicable to the states, the Fifth Amendment which is applicable to the federal government contains no specific equal protection clause. But 'due process' as guaranteed by the Fifth Amendment includes, at least in part, ' equal protection' as guaranteed by the Fourteenth Amendment, Bolling v. Sharpe, [supra]...."

And in speaking of the proscription on the states under the Fourteenth Amendment equal protection clause, Mr. Justice

Holmes declared that a state "may make discrimination, if founded on distinction that we can not pronounce unreasonable and purely arbitrary." Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912). There cases make it clear that for Congressional action to withstand a claim of infirmity under the Fifth Amendment equal protection concept, a rational distinction must be shown to exist.

While on its face such a rational distinction may appear to exist herein, in fact the allegations in the application show that this is not the case. While it may be assumed that § 101(e) was intended to provide for the wholesale activation of entire reserve units, and that it was intended that these units be kept together, cf. 10 U.S.C. 3498, and that the Act, indeed, does apply to these petitioners, the allegations herein show that the unit was broken up, that different men were assigned to different units and to different duties, and that, one by one, the members of the unit were being ordered to duty posts in Viet Nam.

On its face, § 101(c) does apply; each guardsman must, therefore, have been given credit for the active duty time actually served by him. If § 101(c) does not apply to each of these petitioners, then manifestly each is being deprived of duey process under the Fifth Amendment because each is being treated individually in all respects and to the same extent as if each had been activated individually and not as part of a unit. There is no

rational or reasonable distinction between individuals, activated as individuals, who are given credit for prior active duty time and individuals, activated as a unit, who are treated in all respects as individuals and not as a unit, and are not given this credit merely because of the manner in which they were activated.

This case is not at all dissimilar to Levy v. Louisiana, 20 L.ed.2d 436 (1968), wherein this Court held that there existed no rational grounds upon which to distinguish between benefits extended to children upon the basis of the circumstances under which they were conceived. Herein, there is no rational basis for denying credit for active duty to one individual and not to another solely on the basis of the circumstances under which each was activated; the form of the activation, as the manner of the conception in Levy, bears absolutely no relationship to treatment which should be accorded thereafter.

As this record shows there were no findings of law or of fact in the courts below, and the summary treatment accorded this case severly infringes the rights of these petitioners to have tested in court the legality of their restraint by the military. The questions herein are substantial and manifestly cannot be, and should not have been, so summarily treated below. Undoubtedly the final word on these matters has not yet been spoken as this Court has not heretofore reviewed them. The Court's attention is respect-

fully drawn not only to the questions raised herein, but the manner in which these questions arise, i.e., from the dismissal of petitioners' application for order to show cause. Habeas corpus being singularly prized in our society, the action of the courts below in this case should not be allowed to go unnoticed.

CONCLUSION

For the aforesaid reasons, petitioners respectfully submit that the questions are substantial and of considerable importance to all reservists and guardsmen, and ought to be reviewed by this Court and that therefore this petition should be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

[Order of United States Court of Appeals for the Fifth Circuit]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.COURT OF APPEALS
F I L E D

No. 26,797

OCT 7 - 1968

EDWARD W. WADSWORTH
CLERK

HENRY R. DRENT, ET AL.,

Petitioners-Appellants,

versus

COLONEL WILLIAM A. McKEAN, ET AL.,

Respondents.

ON MOTION TO REINSTATE AND GRANT PETITION FOR ORDER TO SHOW CAUSE.

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge.

BY THE COURT:

IT IS ORDERED that the motion of petitioners-appellants for an order reinstating their Application for Order to Show Cause in the United States District Court

for the Northern District of Alabama and for an order granting said Application in this cause be, and the same is hereby, DENIED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By_____
Deputy

New Orleans, Louisiana

OCT 7 - 1968 s/ JMW
RAR Jr.
FMJ

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 910

HENRY R. DRENT, ET AL., PETITIONERS

v.

COLONEL WILLIAM A. MCKEAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court dismissing the application for an order to show cause (Pet. App. A-3) is unreported. The order of the court of appeals denying petitioners' motion to reinstate their application for an order to show cause (Pet. App. A-1) is likewise unreported.

JURISDICTION

The order of the court of appeals (Pet. App. A-1) denying petitioners' motion to reinstate their applica-

tion for an order to show cause was entered on October 7, 1968. The petition for a writ of certiorari was filed on January 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ordering of petitioners, members of the National Guard, to active duty pursuant to Section 101(e) of Public Law 89-687 violated their enlistment agreements.

2. Whether reservists, ordered with their units to active duty under Public Law 89-687, may be assigned to other units.

STATUTES INVOLVED

* * * *

Section 101(e) of Public Law 89-687 (80 Stat. 981) provides:

> (e) Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months.

10 U.S.C. 673(a) provides:

> In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the

jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months.

STATEMENT

Petitioners are members of a New Jersey National Guard unit ordered to active federal service pursuant to the provisions of Subsection 101(e) of P.L. 89-687. They filed an "Application for order to show cause and for writ of habeas corpus" in the United States District Court for the Northern District of Alabama, alleging they had been ordered to active duty illegally.[1] Their basic contention was that Public Law 89-687 could not constitutionally be applied to them, since the agreements under which they had joined the National Guard allegedly made no provision for a 24 months' call-up.

The district court denied the application for an order to show cause on October 4, 1968, (Pet. App. A-3), and the court of appeals denied *per curiam* petitioners' motion to reinstate the petition for an order to show cause (Pet. App. A-1). On October 12, 1968, Mr. Justice Black denied a stay of military orders transferring some of petitioners to Viet Nam, and Mr. Justice Douglas similarly denied a stay on November 18, 1968 (Pet. 7).

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[1] The wives of the guardsmen are also parties, alleging that their husbands were unlawfully activated. As their claims are based on those of their husbands, the term "petitioners" as used herein for convenience shall refer only to the husbands.

ARGUMENT

1. The National Guard unit to which petitioners are attached was called to active duty pursuant to Section 101(e) of Public Law 89-687, which became effective on October 15, 1966. That provision authorizes the President, "when he deems it necessary, [to] order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months." National Guard units are units of the Ready Reserve. 10 U.S.C. 269(b); 10 U.S.C. 261; 10 U.S.C. 3497.

Petitioners' principal contention is that, since Public Law 89-687 was enacted after they had signed their enlistment contracts, calling them to active duty violated their rights under such agreements. This same argument was rejected by the district court and Fourth Circuit in *Morse* v. *Boswell*, 289 F.Supp. 812 (D. Md.), affirmed, 401 F.2d 544, certiorari denied, No. 764, this Term, January 20, 1969,[2] and the same reasoning is equally persuasive here.

As was observed in *Morse* v. *Boswell, supra*, all applicable statutes in effect when petitioners signed the enlistment agreements were incorporated therein by reference. 289 F. Supp at 814. See, *e.g.*, *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 435. Among the statutes in effect at the time they enlisted was 10 U.S.C. 673(a), which provides that "[i]n time of national emergency declared by the

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[2] In their "Application for order to show cause and for writ of habeas corpus" filed in the district court, at p. 15 petitioners asserted that their claims were similar to *Morse* v. *Boswell*, then pending before this Court on the application for a stay.

President after January 1, 1953, or *when otherwise authorized by law,*" the Secretary of Defense may, "without the consent of the persons concerned, order any unit * * * in the Ready Reserve * * * to active duty * * for not more than 24 consecutive months" (emphasis added).

Thus, in their enlistment papers petitioners agreed that they could be called to active duty for up to 24 months "when * * * authorized by law." Public Law 89-687 is a "law" within that phrase which authorized their call to active duty.[3] Although petitioners argue that the phrase "when * * * authorized by law" refers only to laws in existence at the time they signed their enlistment agreements and does not cover laws subsequently enacted, that contention was recently rejected in a well-reasoned opinion by District Judge Dooling in *Winters* v. *United States*, 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, 391 U.S. 896. In holding that provisions in an enlistment agreement signed by a Marine Corps reservist authorizing his call to active

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[3] Another law which authorized petitioners' call to active duty is 10 U.S.C. 263, which provides that "[w]henever Congress determines that more units and organizations *are needed for the national security* than are in the regular components of the ground and air forces," the Army National Guard and the Air National Guard together with units of other reserve components necessary for a balanced force, "shall be ordered to active duty and retained as long as so needed" (emphasis added). Thus, in Public Law 89-687, Congress has made a determination, as contemplated by 10 U.S.C. 263, that more reserve units on active duty, including National Guard units, "are needed for the national security." See also 10 U.S.C. 262 and 10 U.S.C. 672.

duty when "otherwise prescribed by law" and "as the law may require" include laws enacted after he had signed the agreement, that court stated (281 F. Supp. at 295-296):

> Neither the enlistment contract nor the Statement of Understanding says in so many words that it means duty prescribed by law whether already enacted or hereafter passed, but that is the evident and necessary meaning of any language so used in such instruments. Were such instruments construed otherwise they would in effect fetter and embarrass the power of the President and the Secretary of Defense to adopt uniform and practical regulations for the administration of the armed forces and the Ready Reserve, and could indeed operate indirectly as a fetter upon the Congress itself, which would have to take action in contemplation of the existence of a large number of such agreements in force at any one time, and which it would be only appropriate, even if not necessary, that the Congress should consider in enacting new law.

This reasoning is equally applicable to the situation involved in the instant case, and compels the conclusion that the calling of petitioners to active duty pursuant to Public Law 89-687 did not violate the terms of their enlistment agreements.[4] See *Morse* v. *Boswell, supra; Goldstein* v. *Clifford*, 290 F. Supp 275 (D. N.J., statutory three-judge court). In short, pe-

[4] Additionally, as we pointed out in our "Memorandum for Respondents in Opposition to Petition for Stay" filed with this Court on November 14, 1968, petitioners call-up was authorized by the express language of their enlistment contracts.

titioners' enlistment agreements gave them no vested right to be free from future changes in the pertinent statutes.

2. Petitioners argue that Public Law 89-687 did not in absolute terms authorize their call to active duty for a period of 24 months. Section 101(c) of Public Law 89-687, they maintain, requires that they be given credit for any time that certain of them, as individuals, had previously served on active duty. But Section 101(e) specifically says, "Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months." A call to active duty of a reserve unit necessarily involves a call of its individual members, and the most reasonable construction of the statute is that Congress contemplated that the unit—and the unit's individual members—could be ordered to active duty for 24 months, without regard to their previous service. Nor would such a construction deprive petitioners of equal protection. As the district court pointed out in *Morse* v. *Boswell*, "rational differences in treatment of units and individuals are clearly not violations of [equal protection] concepts". 289 F. Supp. at 819. In activating reservists, "Congress could sensibly decide that trained units are more valuable and more needed than individual reservists" (*ibid.*). And, once a reserve unit has been activated, if the military authorities believed that there was no longer any military necessity for the unit's serving together as a full unit, it can scarcely be said that the military does not have the

right to assign the individual unit members to other units. See *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1969.

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